

Sneller Verbatim/JduP.

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 16080/01

2001.07.19

5

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES/NO

(2) OF INTEREST TO OTHER JUDGES

(3) REVISED ✓

DATE 2/8/2001 SIGNATURE [Signature]

10

In the matter between

101019203 SASKATSCHEWAN LIMITED

Applicant

and

KELJET CC trading as CENTRAL AIR CARGO

Respondent

15

J U D G M E N T

WILLIS, J: The applicant has approached the court by way of urgency, seeking the following relief:

1. Interdicting and restraining the Respondent, or anyone acting through it, from using in any manner a Convair 580-Variant/C/L-66B Cosmopolitan Aircraft, Serial No.11154, Registration No.9Q-CLU ("the aircraft"); 20
2. directing the Respondent to return the aircraft forthwith to the Applicant, alternatively directing the Sheriff of this Honourable Court, to immediately take possession of the aircraft; 25

3. directing that the memorandum of agreement entered into between the Applicant and the Respondent on or about 29 May 2001 and attached to the founding affidavit as "KH2", be and is hereby cancelled;
4. directing that the orders referred to in paragraphs 1 and 2 above, operate as interim relief pending the final determination of the application, alternatively an action to be instituted by the Applicant against the Respondent for return of the aircraft and other ancillary relief;
5. costs of suit.

5

10

It is common cause that the parties entered into an agreement on or about 29 May 2001 in terms of which the applicant sold to the respondent the aircraft so described above. The purchase consideration was US\$1 300 000. The relevant clauses of this agreement are as follows:

15

"3 PURCHASE CONSIDERATION

The purchase consideration for the purchase of the aircraft and spare parts for the aircraft is an amount of US\$1,300,000.00 together with interest on the balance owing from time to time at the rate of 10% per annum.

20

4.1 The purchase consideration shall be paid by the Purchaser to the Seller free of any deduction in the following manner:

4.2 The amounts in terms of Annexure 'A' attached hereto reflecting payments of US\$26,027.64 per month as from the date when the aircraft is placed

25

on the Rwandese Air Registry (the Effective Date), and thereafter on or before the 7th day of each succeeding month, to the Seller's bank account, as designated by the Seller to the Purchaser from time to time.

5

4.3 A deposit in the amount of US\$75,000.00 will be made on the Effective Date less the amount of the Credit Note being the sum of US\$50,000.00 which will be passed by the Seller in respect of the amounts owed by North Canada Leasing to the Purchaser."

10

In other words, the effect of clause 4.3 is that a deposit of US\$25,000.00 would be paid.

" 8.1 The Seller shall remain the owner of the aircraft until the Purchaser has paid all amounts and complied with all its obligations in terms of this Agreement notwithstanding the fact that the Purchaser is in possession of the aircraft, whereafter ownership shall vest in the Purchaser."

15

In terms of clause 15.1.3 the seller has the right, after due demand, to cancel the agreement and obtain possession of the aircraft, and recover certain sums of money.

20

It is common cause between the parties that due demand, in the sense of 30 days' written demand, was not given by the seller to the purchaser, and accordingly this clause cannot apply.

25

Clause 15.5 of the agreement reads as follows:

"In the event of the Purchaser failing to effect payment of any instalment on due date or committing any other breach of this Agreement and the Seller decided [deciding] to cancel this Agreement and claim possession of the aircraft, then the Purchaser shall be obliged forthwith to restore the aircraft to the Seller together with all documents, certificates and exemptions issued and current in respect of the aircraft pending an action to be instituted against it pending the conclusion of any such action instituted or to be instituted against the Purchaser."

5

Clause 19.1 reads as follows:

10

"This Agreement shall be in force and effect for an indeterminable period, reckoned from the Effective Date hereof, provided further that that effective date shall be established on or before the 30th day of June, A.D.2001 and the seller at its discretion may extend the said date."

15

It is common cause, although it did not appear initially from the papers, that the aircraft was registered in Kigali, Rwanda on 1 June 2001, and accordingly this is the effective date.

The applicant relies on the provisions of clause 15.5 of the aforesaid agreement, together with the fact that, according to it, the respondent did not pay the amount due to the applicant in terms of the agreement.

20

It is common cause that on 20 June 2001 the respondent addressed the following letter to the applicant:

"Dear Albert,

25

This letter is to confirm the telephonic conversation you had

with Ken Hamilton on the 18th of June 2001, with respect to the supply of two Cockpit voice recorders, two Flight data recorders and a complete set of brake parts for the overhaul of the brake units on aircraft 11154.

It is my understanding that if we send US\$25,000-00 intended for the down payment of the aircraft, you will supply the two Cockpit voice recorders, two Flight data recorders at no charge. The brake parts will of course be for our spares account.

I am in agreement with this arrangement and propose the following: I will send the US\$25,000-00 plus the first monthly instalment on my loan of US\$26,027-64 for a total payment to you of US\$51,027.64. This payment will be sent to you at the end of June 2001. If you agree with the terms and conditions of this letter, then please accept this as a formal written commitment by me and on behalf of Central Air Cargo, to carry out this agreement, and request that you make preparations to ship without delay the abovementioned items.

I also understand fully that the Cockpit voice recorders and Flight data recorders are taken from old surplus and outdated stock, and may or may not be in good working condition, and therefore there is no guarantee or warranty of serviceability implied. Furthermore I understand that although there is no charge for these items, there will be a charge for the freight costs which will be applied to my spares account.

In closing Albert let me say that we sincerely appreciate your efforts and understanding in these sometimes difficult times to

assist us in expanding our airline and look forward to a long and prosperous relationship with you.

Respectfully yours,

Bruce Keller"

It is thus immediately clear that, within a matter of days after 5
the agreement had been concluded, and days after the effective date
coming into operation, the respondent was experiencing difficulty in
effecting the very first payment it was obliged to make to the
applicant in terms of the agreement.

In its answering affidavit the respondent has raised a number of 10
points, most of which in my view ultimately are irrelevant. In
paragraph 11 the respondent says:

*"As a fourth point in limine (sic) I categorically state that no
monies are due nor payable to the Applicant as at date of the
issue of these proceedings on 18 July 2001. Factually two days 15
previous and on 16 July 2001, the total amount claimed was in
fact paid by the Respondent by way of Bank to Bank transfer
made by the Respondent to the Applicant."*

In paragraph 35.2 the respondent alleges:

*"Mr Stevenson informed him of this urgent Application having 20
been foisted upon the Respondent and notwithstanding the
reality that the Respondent had paid all monies as aforesaid on
Monday, 16 July 2001."*

In other words, it is the case of the respondent that the
amounts due had been paid on 16 July 2001. In support of this it 25
annexes *inter alia* certain documentation from the bank, to which I

shall refer later.

It is common cause also that on 17 July 2001 the applicant's attorneys addressed a letter to the respondent, in which they referred to the agreement, advised that the respondent had failed to make payment in terms thereof, and accordingly the agreement was cancelled. The application was brought on 18 July 2001. 5

Before alluding to the bank documentation, which the respondent has annexed, I wish to record that in my view it is hollow to protest that an amount promised to have been paid, in a letter, by no later than the end of June 2001, is only paid on 16 July. It is clear, even in the letter of 20 June 2001 that the respondent was having difficulty in meeting its very first obligation to the applicant in terms of the agreement. It seeks an indulgence, promising to effect payment by the end of June, and then on its own version of events in this court application submits that all amounts due were paid on 16 July 2001. Needless to say, this is hardly good enough, but the issue is even more troubling. 10 15

In the documentation relating to the respondent's dealings with the bank, it annexes a "*Customer application to purchase foreign currency*". This document has the date stamp 16 July 2001. However, the value date in regard to the request for foreign currency is expressed as being 29 June 2001. 20

In my view it is hardly indicative of good faith that the respondent, having made an application to the bank on 16 July 2001, seeks a retrospective value date. But even more significantly, in the foreign exchange customer confirmation, annexure K4 to the 25

respondent's own papers, the *value date* is expressed by the bank as being 19 July 2001. In other words, it simply is not correct that the respondent, as it is alleged, has in fact at the time of hearing of this application, effected the payment.

Accordingly it is clear to me that the respondent is in breach of its undertaking in terms of the agreement, and that the applicant is entitled to rely on the provisions of clause 15.5 of this particular agreement. I shall cast my order accordingly.

I wish to record that the applicant has based the urgency of the application on the fact, *inter alia*, that the respondent uses the aircraft throughout Africa and in dangerous zones, the aircraft has many valuable instruments, which are easily removable. It also avers that the value of the aircraft depreciates on a daily basis.

I find nothing exceptional in these allegations of urgency. Clearly when an aircraft worth US\$1,300,000.00 has been sold, and the respondent is experiencing difficulties with the very initial payments, the security for the whole transaction rests in the aircraft in question. It is obvious that such a valuable aircraft would depreciate on a daily basis. Furthermore, I think it is not unreasonable to be concerned about damage to the aircraft or loss if it is entering dangerous zones. It is true that the applicant makes unfounded allegations concerning its worries about what the respondent would do to the aircraft. I agree that counsel for the respondent rightly protested about such allegations. Nevertheless, it seems to me that clearly there was sufficient urgency to justify this particular application being brought as it was.

A further point was raised by counsel for the respondent, that the notice of motion was drafted as being in the Transvaal Provincial Division. It is clear from the stamp appearing thereon that it was issued by the registrar of the High Court of this Local Division, and it is clear that the attorneys for both sides were in communication about this issue, and that the respondent had indeed filed its answering affidavit as being in the Witwatersrand Local Division.

5

When applications are brought as a matter of urgency, errors of this nature can easily arise. In my view it is entirely technical, and nothing turns on the point. No prejudice clearly arises to the respondent by way of the description of the notice of motion being in the Transvaal Provincial Division. It was not heard in the Transvaal Provincial Division, nor was it heard in the absence of the respondent.

10

ORDER

The following order is made:

15

1. The respondent, or anyone acting through it, is interdicted and restrained from using in any manner a Convair 580-Variant/C/L-66B Cosmopolitan Aircraft, serial No. 11154, registration No. 9Q-CLU ("the aircraft").
2. The respondent is directed to return this aircraft forthwith to the applicant, alternatively the sheriff of this court is directed immediately to take possession thereof.
3. The order in paragraph 1 above is to operate as interim relief pending a further order by this court.
4. All interested persons are called upon to show cause on 11 September 2001 why the order in paragraph 1 above should

20

25

16080/01-JduP

10

JUDGMENT

not be made final.

5. The costs of this application are reserved.

ON BEHALF OF THE APPLICANT:

ON BEHALF OF THE RESPONDENT:

5